PP

v.

MOHAMED AZMIN ALI

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL REVISION NO: 43-11-2000]
1 AUGUST 2000

CRIMINAL PROCEDURE: *Defence - Witnesses - Demand to recall witness before succeeding judge under s. 261 Criminal Procedure Code - Whether accused should first proceed under s. 173(j)(3) - Purpose of s. 261 - Whether if demeanour of witness material to case*

The respondent was discharged and acquitted in the sessions court under s. 173(f)(2) of the Criminal Procedure Code ('CPC'). Upon an appeal by the public prosecutor, the High Court ruled that the prosecution had made out a *prima facie* case and ordered that the respondent enter on his defence under s. 173(h)(1) CPC. At the same time, the High Court remitted the case to the sessions court for continued trial. In the sessions court, the respondent demanded to recall a prosecution witness under s. 261(a) CPC. The sessions judge allowed the recall.

The issue now for revision was whether the demand to recall the witness under s. 261 CPC was proper.

Held:

[1] Section 173(j)(3) provides that an accused shall be allowed to recall and cross-examine any witness present in court or its precincts. Recall of witnesses who are in court are allowed as it will not cause the trial to be adjourned, delayed or defeat the ends of justice.

[2] The mandatory words in s. 173(j)(3), *ie*, "shall be allowed to recall and cross-examine any witness" superficially suggest that the court cannot question the purpose of recalling and cross-examining any witness. However, authorities suggest that an application under s. 173(j)(3) to recall witnesses should normally be allowed unless frivolous or vexatious.

[3] The term "re-summon" in s. 261 envisages its application to a case where the witness is not in the court or its precincts. Thus, the accused must first verify if the witness for the purpose of examination or cross-

examination is in court or within its precincts. It followed that an accused must first proceed under s. 173(j)(3) when entering on his defence. It will be premature for an accused to proceed to "demand" under s. 261.

[4] If there is an apprehension that demeanour is important in the assessment and consideration of the evidence of the witness because it affects the credibility of the particular witness and for which the record is inadequate, that reason must be given and made out.

[5] The right to demand is only given to the accused and the term used in s. 261 is to rehear the witness, which implies going over the same evidence. This supports the view that the exercise is to give the second magistrate an opportunity to appreciate the demeanour. Within this purpose of s. 261, the accused may properly demand the re-summoning and rehearing of the witness.

[6] Section 261 should not be read as overriding the provisions of s. 173 but must be read harmoniously with the other provisions of the CPC.

[Directions given accordingly.]

Case(s) referred to:

Abdul Hamid Udin v. PP [Rayuan Jenayah Kuala Lumpur Bil 42-24-99] (unreported) ***(refd)***
Hassan v. PP [1962] 28 MLJ 323 ***(refd)***
Mohamed Anuardin Abdul Salam v. PP [1997] 3 CLJ 243 ***(refd)***
Mohamed Idris Hj Mohamed Said v. R [1949] MLJ 31 ***(refd)***
Mohamed Salleh v. PP [1969] 1 MLJ 104 ***(refd)***
Ng Hoi Chen & Anor v. PP [1968] 1 MLJ 53 ***(refd)***
Ong Boon Siang & Ors v. PP [1961] MLJ 4 ***(refd)***
PP v. Sanassi [1970] 2 MLJ 198 ***(refd)***
R v. Smith (Joan) [1968] 2 All ER 115 ***(refd)***
Thomas v. Thomas [1947] AC 484 ***(refd)***
Soon Kong Meng & Anor v. Lee Thye & Ors [1995] 4 CLJ 547 ***(refd)***
Wong Sin Chong & Anor v. Bhagwan Singh & Anor [1993] 3 MLJ 679 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 35
Criminal Procedure Code, ss. 173(c), (f)(2), (h)(1), (2), (j)(2), (3) prov 1, (k), (l)(1), 261(a), 271, 425

For the appellant - Zauyah Be Loth Khan, DPP
For the respondent - CT Prabhakaran (Roy Prabhakaran with him); M/s Praba & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

In this case the first trial judge in the Sessions Court in Kuala Lumpur had discharged and acquitted the respondent under s. 173(f)(2) at the end of the prosecution case. Upon an appeal by the public prosecutor, the High Court had ruled on 17 February 2000 that the prosecution had made out a *prima facie* case, ordered that the accused enter on his defence under s. 173(h)(1), and at the same time remitted the case to the Sessions Court for continued trial.

When hearing finally re-commenced in the Sessions Court on 5 July 2000, Mr. CV Prabhakaran demanded under s. 261(a) of the Criminal Procedure Code (CPC) to recall a prosecution witness, Mohd. Azhar bin Othman (PW6). The only ground on the notes of proceeding of the judge is that notice has been given on 3 July 2000. After hearing objections from the learned deputy public prosecutor, the learned judge of the Sessions Court allowed the recall upon the basis he had no choice in view of s. 261 of the CPC.

The Issue

The question posed in this case is whether the second trial judge should proceed from s. 173(h)(2) to s. 173(j)(3) or, that before he does so, he must allow the respondent to recall witnesses under s. 261(a).

On the face of it, s. 261(a) allows an accused to demand that witnesses who had previously given evidence before the preceding judge to be re-summoned and re-heard before a succeeding judge. Whether he may do so before he enters on his defence so requires a consideration of ss. 173 and 261.

Section 173 And Calling For The Defence

Section 173(f) provides that at the end of the prosecution case the court shall consider if a *prima facie* case has been made out by the prosecution against the accused, and if the answer is negative the court shall record an order of acquittal:

> (f)(1) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
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> (2) If the Court finds that the prosecution has not made a *prima facie* case against the accused, the Court shall record an order of acquittal.

If the court finds that a *prima facie* case has been made out on the offence as charged, it proceeds under s. 173(h)(1) to call upon the accused to enter on his defence:

> (h)(1) If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.

On the other hand, if after hearing the prosecution evidence the court finds that a *prima facie* case has been made out not on the offence as charged, but on another offence which is within the competence of that court to try, the court is obliged to amend the charge, which is read out and a plea taken. If the accused pleads guilty he may be convicted thereon and sentenced according to law. If the accused does not plead guilty upon the charge as amended, he shall be called upon to enter his defence. The relevant provisions are as follows:

> (h)(2) If the Court finds that a *prima facie* case has been made out against the accused on an offence other that the offence charged which such Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge. [Subs. Act A979]
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> (i) The charge if amended shall be read to the accused as amended and he shall be again asked whether he is guilty of the offence in the charge as amended. [Am. Act A979]
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> (j)(1) If the accused pleads guilty to the charge as amended, the plea shall be recorded and he may be convicted thereon and the Court shall pass sentence according to law: Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.
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> (2) If the accused does not plead guilty to the charge as amended, the accused shall be called upon to enter on his defence.

There are therefore two avenues under s. 173 leading to calling upon an accused to enter on his defence.

When Accused Enters On His Defence: Section 173(j)(3)

Whether the accused is called upon to enter on his defence under s. 173(h)(1) or 173(j)(2), the CPC contains only a single provision as to how to proceed. It is contained in s. 173(j)(3):

(j)(3) When the accused is called upon to enter on his defence, he may produce his evidence and shall be allowed to recall and cross-examine any witness present in the Court or its precincts;

Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided further that any accused person who elects to be called as a witness may be cross examined on behalf of any other accused person.

Mr. CV Prabhakaran had submitted that s. 173(j)(3) applies only to a case where the charge has been amended by the court.

Since there is no other provision setting out the procedure in the event of the accused being called to enter on his defence under s. 173(h)(2), a trial would be unable to proceed if the submission is adopted. It is trite that to interpret and reconcile laws so that they harmonize is the best mode of construction (*Interpretare et concordare leges legibus est optimus interpretandi modus*). Thus a construction is to be made so that the subject may have an effect rather than none (*Interpretatio fienda est ut res magis valeat quam pereat*). It would offend the rule to give the interpretation as submitted by Mr. CV Prabhakaran.

A perusal of s. 173 also shows that the sub-sections and paragraphs therein deal with various steps and alternatives in the procedure that may converge and overlap at different stages. In such case the numbering sequence carry little meaning. In *Soon Kong Meng & Anor v. Lee Thye & Ors* [1995] 4 CLJ 547 FC the Federal Court adopted the mode of construction so that the subject may have an effect rather than none to the extent of giving words a meaning that is not strictly in accordance with its ordinary general meaning:

> Even though sometimes the said sense is strictly not in accordance with the ordinary general meaning of the words used, words in a statute ought to be construed in a sense which best harmonize with the subject of the statute and in which also, the object of the statute is to be attained. As a result, any words in a statute, in order for them to accord with the intention of the legislature, could be extended or restricted realistically as the case may be, on their interpretation.

I would therefore give s. 173(j)(3) the construction that the procedure therein applies following both s. 173(h)(2) and s. 173(j)(2).

Right Of Accused Entering On His Defence

Other than s. 173(k) that if the accused puts in any written statement the court shall file it with the record, the CPC did not make any provision for election by an accused. In *Mohamed Salleh v. PP* [1969] 1 MLJ 104 FC held in respect of the right to make a statement from the dock, as follows:

> In our judgment, the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Procedure Code. It seems to us beyond doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an express statutory provision to that effect.

This right was recognised in *PP v. Sanassi* [1970] 2 MLJ 198 and *Ng Hoi Chen & Anor v. PP* [1968] 1 MLJ 53. Thus an accused must decide whether to a) remain silent; b) make a statement from the dock or put in a written statement (see s. 173(k)) or c) to give evidence on oath, in which case his evidence must be taken before that of other witnesses for the defence (see s. 173(j)(3) proviso 1).

Section 173 First Proviso

The first proviso of s. 173(j)(3) provides that his evidence must be taken before that of other witnesses for the defence.

The reason why an accused who has elected to give evidence must be called first can be seen in *R v. Smith (Joan)* [1968] 2 All ER 115 CA, where it was held:

> At a trial of a criminal charge the accused, if he gives evidence, should be called before any of his witnesses, and thus should give his evidence before he has heard the testimony of his witnesses; it is also the general rule and practice in criminal eases that witnesses as to fact on each side should remain out of court until they are required to give their evidence (see p. 115, letter H, and p. 116, letter C, post).

Cusack J explained it in that case as follows:

> The general rule and practice in criminal cases is that witnesses as to fact on each side should remain out of court until they are required to give their

> evidence. The reason for this is obvious. It is that if they are permitted to hear the evidence of other witnesses they may be tempted to trim their own evidence. It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before other witnesses who may be called on his behalf. There are, of course, rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the court in the special circumstances then prevailing.

An accused person cannot be kept out of the court like other witnesses. He would have to give evidence first before he hears the examination and cross-examination of his witnesses. Otherwise he might be accused of having trimmed his own evidence to suit the evidence he has heard of his own witnesses. Indeed, having his evidence heard first helps to protect his credibility.

Section 173 And Calling Of Witnesses

Section 173(j)(3) also provides that he shall be allowed to recall and cross-examine any witness present in court or its precincts. Recall of witnesses who are in court or within the precincts are allowed as it will not cause the trial to be adjourned, delayed or defeat the ends of justice. Section 173(j)(3) uses the mandatory "shall be allowed to recall and cross-examine any witness". These would superficially suggest the court cannot question the purpose of recalling and cross-examining the witnesses. Even so, it was held in *Hassan v. PP* [1962] 28 MLJ 323, following *Ong Boon Siang & Ors v. PP* [1961] MLJ 4 that an application under s. 173(j)(3) to recall witnesses should normally be allowed unless it was frivolous or vexatious. In *Wong Sin Chong & Anor v. Bhagwan Singh & Anor* [1993] 3 MLJ 679 SC 687, the Supreme Court spelt out the general principle limiting the right to call witnesses:

> …. In every case, the onus is on the party issuing the subpoena to show the materiality of the witness for the just decision of the case, in that it outweighs any oppression that may be caused to the party objecting ...

The concern that the calling and recalling of witnesses should not be used as a device for vexation, delay or otherwise defeat the ends of justice is reflected in s. 173(l)(1) which provides for the calling of witnesses whether or not he has been previously examined:

> (l)(1) If the accused applies to the Court to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purpose of examination or cross-examination or the production of any document or other thing, the Court shall issue such process unless it considers that such application should be refused

on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by it in writing.

(2) The Court may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

Section 425 of the CPC gives authority to the court to summon or recall witnesses if his evidence appears to be essential to the just decision of the case:

425 Power of Court to summon and examine persons

Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Re-Summoning And Rehearing Under s. 261

Section 261(a) provides that in any trial the accused may, when a second magistrate commences his proceedings, **demand** that the witnesses or any of them be **re-summoned** and **reheard**:

261. Change of Magistrate during hearing.

Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:

Provided as follows:

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;

(b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

From the use of the term "re-summon" it follows that s. 261 envisages its application to a case where the witness is not in the court or its precincts. Thus the accused must first verify if the witnesses for the purpose of examination or cross-examination is in court or within its precincts. In other words he must first proceed when entering on his defence, under s. 173(j)(3). If he did not, it is premature for him to proceed to 'demand' under s. 261.

Re-summoning the witnesses means, that fresh summons are to be issued. That clearly involves adjournment to another day so that the summons may be served. Adjournments are *prima facie* undesirable and ought to be minimized. Judges and magistrates are transferred in the ordinary course of service. That creates precisely the problem that s. 261 seeks to address. Multiple or long adjournments reduce the value of personal and direct observation of the demeanour of witnesses, which is the primary advantage a trial judge has over an appellate judge who relies on the written notes. Unless therefore the observation of demeanour whilst under examination in the notes is recorded at the conclusion of his evidence and at the foot thereof as allowed by s. 271 of the CPC, the value of observation of demeanour diminishes over time.

The risk and inconvenience of delays must be balanced by the importance and value of a judge being able to see and hear witnesses. Lord Thankerton in Watt or *Thomas v. Thomas* [1947] AC 484, 487 described the importance as follows:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection, of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion: The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion.

The above recognises that the opportunity of seeing and hearing the witness as he is examined, cross-examined and re-examined is a special advantage not necessarily available to an appellate court relying on the notes of evidence. The second magistrate relying on the evidence recorded by the previous magistrate is in that sense not in a dissimilar position.

Section 261(a) allows a witness to be re-summoned to be re-heard. The term 're-heard' suggests that the examination, cross-examination and re-examination in the rehearing is to cover the same ground dealt with in the examination,

cross-examination and re-examination before the preceding judge, and not for the purpose of bringing up new matters, application for which ought to be justified under other provisions such as ss. 173(j)(3), 173(l) and 425. It can be seen therefore that the only purpose of s. 261 CPC is to enable the succeeding judge to see the demeanour of the witness.

However, that the CPC does not view the opportunity to see the demeanour of the witness as absolutely essential is reflected in s. 261 which gives the magistrate a discretion to decide whether to act on the evidence entirely recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial. Acting judicially, the second magistrate has a complete discretion: see *Mohamed Anuardin bin Abdul Salam v. PP* [1997] 3 CLJ 243.

In *Abdul Hamid bin Udin v. PP [Rayuan Jenayah Kuala Lumpur Bil 42-24-99] (unreported)*, this court had said in respect of section 261, that:

> It is always very highly desirable that judgment in any case should be given by the judge who has heard and recorded all the evidence himself and has heard and seen the witnesses (see *Chong Kwee Hian v. PP* [1948] 14 MLJ 191). Would that it be that all that is desirable will come to pass. However, judges may move on or be transferred, and no longer exercise jurisdiction in a case. Provision in the event of changes of trial magistrates and judges in the sessions and magistrates' courts (see *PP v. Mohd Jon* [1993] 1 MLJ 133) is therefore made in Section 261 of the Code:
>
> **261 Change of Magistrate during hearing**
>
> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had ..., if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

Nevertheless the fact remains that a trial judge taking over a trial from another judge would be very much at a disadvantage when he does not have the means of assessing the demeanour of the witnesses so far called (see *PP v. Mohd Jon*). It is self-evident that the disadvantage exists only where the demeanour of witnesses is important in the assessment of the evidence of the particular witness. It is not so important in the case of more or less formal witnesses (see *Mohamed Idris bin Haji Mohamed Said v. R* [1949] MLJ 31. In other words, demeanour is not always a determining factor in the assessment of the testimony of a witness. In *Mohamed Idris bin Haji Mohamed Said v. R* it was also recognized there might be cases where the succeeding judge has no option but to rely on the recorded testimony if the witness cannot be found. The extent to which the succeeding judge can rely upon the recorded testimony and the weight to give to it must depend upon the nature of the recorded testimony, and the challenge it is subjected to. If the personal credibility of the witness is challenged, his demeanour would be material. An incoming judge would not necessarily be aware if demeanour of any particular witness is important by a reading of the record, unless a note of the demeanour is recorded in accordance with s. 271 of the Code, which provides:

271. Remarks as to demeanour of witness.

A presiding Magistrate recording the evidence of a witness may, at the conclusion of such evidence and at the foot of the notes thereof, record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Where a judge recording the evidence had not found it necessary to record the demeanour of a witness as so provided, then it is fair and reasonable to conclude that the trial judge did not view that demeanour in court of that witness is a very important factor in assessing his credibility. In such a case, the recorded evidence is an adequate presentation of his evidence. Of course a trial judge may consider demeanour in his decision even though he had not seen it necessary to record his impressions of the demeanour under s. 271, such demeanour cannot be as influential as demeanour he has seen fit to record.

If the accused is anxious that demeanour should be considered, proviso (a) of the section provides that he may in such cases demand that any of the witnesses be re-summoned and re-heard. Such demand would make demeanour into an issue to be considered. Otherwise, consideration of the sworn testimony without reference to demeanour is not by itself a fatal flaw. It must first have been put in issue.

Inasmuch as an appellate court is not precluded from departing from the findings of fact of a trial judge simply because the former had not seen the witnesses, so also a succeeding magistrate is not precluded from making findings of fact from notes of evidence even entirely not recorded by him. If there is apprehension that demeanour is important in the assessment and

consideration of the evidence of the witness because it affects credibility of the particular witness, and for which the record is inadequate, that reason must be given and made out because that is the purpose of the first proviso of s. 261. The first proviso of s. 261 was not enacted to give an unfettered right to demand re-summoning and re-hearing of a witness merely because there is a different magistrate but to ensure that the second magistrate is able to assess personally the demeanour and credibility of the particular witness and to weigh his evidence accordingly.

The right to demand is given only to the accused and the term used in section is to rehear the witness, which implies going over the same evidence, and supports the view the exercise is to give the second magistrate an opportunity to appreciate the demeanour. Within this purpose of s. 261, the accused may properly demand the re-summoning and rehearing of the witness. The term 'demand' in the section is to ensure that the benefit of the doubt be given to the accused in the event, on the basis of the written record, there is uncertainty that demeanour would be material or not. In brief, the first proviso of s. 261 is not a license to re-call, re-examine or re-cross-examine witnesses simply because a different magistrate is continuing the trial, or to a) delay the day of judgment or b) give an opportunity to re-tailor cross-examination and defence after having heard the whole of the prosecution case. Section 261 cannot therefore be read as overriding the provisions of s. 173 but can and must be read harmoniously with the other provisions of the CPC to achieve the only purpose of a trial, that is, to fairly elicit the truth.

In this case the following had occurred. High Court had ruled on 17 February 2000. The case was mentioned on 10 March 2000 and adjourned to 11 April 2000 because of an appeal to the Court of Appeal. On that date the court was informed the respondent could not attend because he had to be in another case in the High Court. The trial was adjourned to 9 May 2000. On that date the trial was adjourned further to 13 and 14 June 2000. On 13 June 2000 the respondent did not attend because he was ill. The trial was adjourned to 5, 7 and 8 July 2000. On 5 July 2000 an application was made to recall a witness PW6, resulting in this revision. There seems to be an unfortunate history of delay.

At the end of the day the accused is not without remedy. The second proviso empowers the High Court, whether there be an appeal or not, to set aside any conviction made on evidence not wholly recorded by the magistrate before whom the conviction was made, if such High Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

Conclusion

The order by the High Court is clear and unequivocal, that is, an order to the respondent to enter upon his defence. He will first have to decide whether to give evidence from the witness box, to make or file a statement, or to remain silent. If he elects the first he must give evidence before he calls other witnesses. He may at the same time demand to re-summon for rehearing witnesses where their demeanour as witnesses are material to their credibility in the assessment and consideration of their evidence, and for which latter purpose the record is inadequate. Such re-summoning shall not be a ground for postponement so long as the respondent has other witnesses to call. This is to avoid misapplication of s. 261 which may cause unnecessary delay, vexation and defeat the ends of justice or lead to impairment of the credibility and weight of the respondent's evidence should he elect to give evidence. It is desirable therefore in the interests of justice that these directions are given, pursuant to s. 35 of the Courts of Judicature Act 1964.